

# MITIGATION BANK ENABLING INSTRUMENT

## \_\_\_\_\_ MITIGATION BANK

This Bank Enabling Instrument (hereinafter "BEI") regarding the establishment, use, operation and maintenance of the \_\_\_\_\_ Mitigation Bank (hereinafter "Bank") is made and entered into by and among the following:

\_\_\_\_\_ (hereinafter, "Sponsor")  
San Francisco District of the U.S. Army Corps of Engineers (USACE)  
Region 9 of the U.S. Environmental Protection Agency (USEPA)  
Sacramento Field Office of the U.S. Fish and Wildlife Service (USFWS)  
California Department of Fish and Game (CDFG), Central Coast Region

with reference to the following:

### Section 1: Preamble

**A. Purpose:** The purpose of this BEI is to establish guidelines and responsibilities for the implementation, use, operation, and maintenance of the Bank. The Bank is available to be used for off-site compensatory mitigation for any of the following:

- unavoidable impacts to waters of the United States, including wetlands, which result from activities authorized under Section 404 of the Clean Water Act (hereinafter "Section 404");
- impacts to federally-listed threatened or endangered species under Section 7 and 10a of the Endangered Species Act (hereinafter "Section 7" and "Section 10a" respectively) and/or occupied habitat;
- impacts to State of California-listed threatened or endangered species under the California Endangered Species Act, Fish and Game Code Section 2050 et seq. (hereinafter "CESA");
- mitigation for significant impacts to wetland and wildlife resources under the applicable sections of the California Environmental Quality Act, Public Resources Code Section 21000 et seq. (hereinafter "CEQA");
- unavoidable impacts to waters of the State of California which result from activities authorized under Section 1600 et seq. of the California Fish and Game Code (hereinafter "Section 1600");
- the establishment and/or preservation of habitat associated with the Natural Communities Conservation Planning program, Fish and Game Code Section 2800 et seq. (hereinafter "NCCP");

provided the Bank meets all requirements applicable for mitigation with respect to a particular project and that mitigation through use of a bank is authorized by the appropriate authority.

**B. Location and Ownership of Parcel:** The Bank site is owned by \_\_ (Property Owner)\_\_\_\_\_ and is located at \_\_ (address)\_\_\_\_\_. The mailing address is \_\_ (City)\_\_\_\_\_ (zip code: 9xxxx). The site is \_\_\_\_\_ (location, nearby features)\_\_\_\_\_. The Property size is approximately \_\_\_\_\_ acres, \_\_\_\_\_ acres of which are proposed as the Bank.

**C. Project Description:** Whereas, under this banking instrument, the Sponsor may preserve, restore, enhance and/or establish, and then maintain the following types of habitat in accordance with the Bank Development Plan:

1. Corps Jurisdictional Waters of the United States (including wetlands);
2. Non-Corps jurisdictional Oak/Riparian Habitat;
3. Habitat(s) of Endangered and Threatened Species listed under the federal ESA; and
4. Habitat(s) of Endangered and Threatened Species listed under the California CESA.

The habitats to be protected at the Bank are described in Exhibit B and Exhibit G.

## **Section II: Stipulations**

**A. Baseline Condition:** Whereas, the Bank area is currently as described in the Bank Development Plan (Exhibit B).

**B. Establishment and Use of Credits:** Whereas, it is anticipated that, in accordance with the provisions of this banking instrument at Section (V)(D-G), *infra*, credits will be available to be used as off-site mitigation in accordance with all applicable requirements.

**C. Composition of the Mitigation Bank Review Team (MBRT):** Whereas, the members of the Mitigation Banking Review Team (MBRT) consist of the following:

U.S. Army Corps of Engineers, San Francisco District (USACE), Chair;  
U.S. Fish and Wildlife Service, Sacramento Field Office, (USFWS);  
California Department of Fish and Game (CDFG); and  
U.S. Environmental Protection Agency, Region 9 (USEPA).

**D. Disclaimer:** Whereas, this BEI does not in any manner limit the statutory authorities and responsibilities of the signatory parties, but is, instead, an implementation of such statutory authorities and responsibilities.

**E. Exhibits:** Whereas, the following Exhibits are incorporated as appendices to this BEI:

1. "Exhibit A", Bank Location, parcel map, and legal description of the parcel;
2. "Exhibit B", Bank Development Plan, service area, and all subsequent revisions and addenda thereto, as identified by the MBRT;
3. "Exhibit C", Conservation Easement;
4. "Exhibit D", Financial Assurances;
5. "Exhibit E", Summary of Habitat Acreages;
6. "Exhibit F", Bank Closure Plan;
7. "Exhibit G", Table of Credits;

8. "Exhibit H", Title Report;
9. "Exhibit I", Level 1 Environmental Contaminants Survey;
10. "Exhibit J", Credit Sale Confirmation/Agreement and Conservation Credit Accounting Spreadsheet, Mitigation Payment Transmittal Form, Instructions for Invoicing;
11. "Exhibit K", Cultural Resources Survey Report;
12. "Exhibit L", Map of pre-existing jurisdictional Wetlands and Other Waters;
13. "Exhibit M", Letters of Debt Subordination; and
14. "Exhibit N", Management Plan.

#### **F. Definitions:**

"Bank Closure Plan" is designed to ensure that the Bank Site is managed and maintained, in perpetuity, consistent with the conservation purposes of the Project.

"BEI" means this Mitigation Bank Enabling Instrument.

"Bank Development Plan" means the document that describes the proposed construction and wetland and/or special status species habitat establishment activities including creation, restoration, enhancement, habitat establishment period, and the success criteria to obtain successful habitat establishment.

"CDFG" means the California Department of Fish and Game, a subdivision of the California Resources Agency.

"CEQA" means the California Environmental Quality Act (California Public Resources Code Sections 21000 et seq.; guidelines for implementation at California Public Resources Code Sections 15000 et seq.), including all regulations promulgated pursuant to that Act.

"CESA" means the California Endangered Species Act (California Fish and Game Code Sections 2050 et seq.), including all regulations promulgated pursuant to that Act.

"Conservation Easement" means a recorded conservation easement established to conserve biological resources, and which imposes certain habitat management obligations for the Mitigation Bank lands.

"Contingency Security" is an amount that the Sponsor shall fund to assure performance of Sponsor's maintenance and remediation obligations to meet success criteria under this BEI during the interim management period (prior to the time that the Management Endowment is fully funded for one year), including, without limitation, its obligation to cure its defaults and deficiencies under this BEI.

"Credit" is a unit of measure representing the accrual or attainment of wetland/riparian functions and/or special status species habitat at a mitigation bank; the measure of function is typically indexed to the number of wetland acres and/or the number of special status species habitat acres restored, enhanced, created, or preserved. One credit here is equivalent to one acre.

"Endowment Deposit" means the sum of money per Credit deposited into the Management Endowment Fund for purposes of perpetually endowing the long-term management of the Mitigation Bank lands for the benefit of biological resources.

"ESA" means the federal Endangered Species Act (16 U.S.C. Section 1531 et seq.), including all regulations promulgated pursuant to that Act.

"Habitat Conservation Plan" ("HCP") means a conservation plan prepared pursuant to Section 10(a)(2)(A) of the ESA (16 U.S.C. Section 1539(a)(2)(A)).

"Management Endowment Fund" means a fund maintained by the CDFG as a non-wasting endowment to be used exclusively for the management of the Mitigation Bank lands in accordance with the Management Plan, the Bank Closure Plan, and the Conservation Easement.

"Management Plan" means a specific, long-term plan developed for the Bank to ensure that the Bank is managed and maintained, in perpetuity, consistent with the conservation purposes of the Bank. The Management Plan is the document approved by the MBRT that governs the maintenance, management, monitoring, and reporting of the wetlands and special status species habitats in perpetuity after bank closure and as funded through the management endowment fund. For special status species there will be an adaptive management component.

"Mitigation Bank Review Team" (MBRT) means an interagency group of Federal, State and /or local agency representatives which oversee the establishment, use and operation of a mitigation bank.

"Performance Security" means an account funded by the Bank Sponsor in the amount of 100% of the cost of wetland construction and enhancement. The Security shall be in the form of a letter-of-credit, an escrow account, or cash. The cost of construction shall be the amount set forth in the construction contract entered into by Sponsor. The Performance Security assures performance of Sponsor's obligation to construct the wetlands in accordance with this BEI.

"Service Area" means the geographic area within which impacts that occur may be mitigated through use of credits at the \_\_\_\_\_ Mitigation Bank consistent with the BEI.

"USACE" mean the United States Army Corps of Engineers, an agency of the Department of the Army.

"USFWS" means the United States Fish and Wildlife Service, an agency of the United States Department of Interior.

### **Section III: Authorities**

#### **A. Federal:**

1. Clean Water Act (33 USC 1251 et seq.);
2. Rivers and Harbors Act (33 USC 403);
3. National Environmental Policy Act (42 USC 4321 et seq.);
4. Endangered Species Act (16 USC 1531 et seq.);
5. Fish and Wildlife Coordination Act (16 USC 661 et seq.);
6. National Historic Preservation Act (16 USC 470);
7. Regulatory Programs of the U.S. Army Corps of Engineers, Final Rule (33 CFR Parts 320, 330);

8. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR Part 230);
9. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under the Clean Water Act, Section 404(b)(1) Guidelines;
10. Federal Guidance for the Establishment, Use, Operation of Mitigation Banks (60 FR 58605 et seq., hereinafter "Guidelines");
11. Guidance for the Establishment, Use and Operation of Conservation Banks (United States Department of Interior Memorandum, dated May 2, 2003); and
12. San Francisco District Public Notice 02-03, dated March 5, 2003, titled "Mitigation Bank Policy on the Santa Rosa Plain".

**B. State:**

1. California Environmental Quality Act (Pub. Res. Code Section 21000 et seq.);
2. California Endangered Species Act (Fish & Game Code Section 2050 et seq.);
3. California Natural Community Conservation Planning Act (Fish & Game Code Section 2800 et seq.);
4. Streambed Alteration Agreements (Fish & Game Code Section 1600 et seq.);
5. Sacramento-San Joaquin Valley Mitigation Bank Act of 1993 (Fish & Game Code Section 1775 et seq.); and
6. Official Policy on Conservation Banks, April 7, 1995, by California Resources Agency and California Environmental Protection Agency, jointly.

**NOW, THEREFORE, the parties agree to the following:**

**Section IV: Establishment of the Bank**

**A. Sponsor's Performance Under the BEI:** The Sponsor agrees to perform all necessary work, in accordance with the provisions of this BEI, to establish the wetland and/or special status species habitats, as proposed in Exhibit B, until it is demonstrated to the satisfaction of the MBRT that the Bank complies in all respects with all conditions contained herein. Sponsor agrees to be responsible for all costs associated with the establishment of the Bank, including but not limited to construction, remediation, maintenance, management, monitoring, and reporting, until one year after the Management Endowment Fund is fully funded.

**B. Environmental Documentation and Permitting:** To the extent not already obtained, the Sponsor will be responsible for obtaining all appropriate environmental documentation, permits or other authorizations needed to establish and maintain the Bank, which may consist of any or all of the following permits, clearances, or approvals:

1. CEQA compliance;
2. Section 401 Clean Water Act Water Quality Certification or Waiver;
3. Section 404 Clean Water Act Fill Discharge Permit;
4. Streambed Alteration Agreement;
5. Federal Endangered Species Act (Section 7 or Section 10) compliance; and

6. California Endangered Species Act (Fish and Game Code Section 2050 et seq) compliance.

**C. Modification of the Bank Development Plan:** Creation and enhancement of habitat on the Bank site will be performed as described in Exhibit B, and the credits will become available in accordance with the schedule specified in Section V(F), of the BEI. Any subsequent Phase of the bank must be approved by the MBRT prior to establishment of that Phase. In the event that the Sponsor determines that modifications must be made in the Bank Development Plan to ensure successful establishment of habitat within the Bank, or in order to comply with specific permits or other authorizations needed to establish the Bank, the Sponsor shall submit a written request for such modification to the MBRT. The Sponsor shall then implement all modifications approved by the MBRT. Documentation of implemented modifications shall be made consistent with Section IV(F), *infra*.

**D. Financial Assurance Requirements:** The Sponsor agrees to provide the following financial assurances over the life of the Bank and at Bank Closure, for the periods noted:

1. The first 15% of Bank credits shall be released upon the signing of the BEI and submission of an executed Conservation Easement. Prior to the transfer of any Bank credits, Sponsor shall furnish CDFG with a "Performance Security" in the amount of 100% of the cost of construction. The Security shall be in the form of a letter-of-credit, cash or some other form acceptable to CDFG. The cost of construction shall be the amount set forth in the construction contract entered into by Sponsor. The Performance Security shall assure performance of Sponsor's obligation to construct the wetland and special status species habitats in accordance with this BEI. If all specified grading and related implementation work is completed prior to the release and sale of credits, no Performance Security is required. The Performance Security shall be released upon Sponsor's completion of such construction, as evidenced by:

(a) The submission of the as-built drawings, per Section IV(F); and

(b) Verified by a subsequent on-site inspection involving some, or all, of the members of the MBRT.

2. During the period of Bank operation, the Sponsor shall furnish the "Contingency Security" to CDFG.

(a) The Contingency Security shall assure performance of Sponsor's maintenance and remediation obligations under this BEI during the interim management period (prior to the time that the Management Endowment is fully funded for one year), including, without limitation, its obligation to cure its defaults and deficiencies under this BEI. The amount of the Contingency Security shall be equal to the amount indicated in Exhibit D and shall be fully funded prior to the release of the second group (35%) of wetland creation credits.

(b) Provided the Bank meets the success criteria specified in the Bank Development Plan, the Contingency Security shall be released upon the later of: (i) the fifth anniversary of the date of this BEI; or (ii) the third anniversary of the remedial action most recently taken in order to meet the

success criteria set forth in the Bank Development Plan; or (iii) after the Management Endowment Fund has been fully endowed for one year.

3. During the period the Bank is open, the Sponsor shall make deposits into a non-wasting endowment fund held by the CDFG in order to assure long-term maintenance of the Bank property in perpetuity (Management Endowment Fund). The total amount of endowment to be funded is shown in Exhibit D. For any year the endowment is not fully funded, this total endowment shown in Exhibit D shall be adjusted annually, beginning on January 1, 20\_\_, and upon each one-year anniversary thereafter (each such date, beginning January 1, 20\_\_, is referred to hereinafter as an "Adjustment Date"), by a percentage equal to the percentage increase, if any, in the Consumer Price Index (CPI) for All Urban Consumers (Base Years 1982-1984 = 100) for California, calculated by the CA Department of Finance using a formula developed by the CA Dept. of Industrial Relations (DIR) which is published most immediately preceding the Adjustment Date, as compared to the CPI published most immediately preceding the date of this BEI (the "CPI Adjustment").

(a) Endowment funds shall be sent to CDFG on the following schedule:

- (i) 25% of the total endowment shall be funded prior to release of the second group (35%) of wetland creation credits.
- (ii) An additional 50% of the total endowment shall be funded prior to release of the third group (20%) of wetland creation credits.
- (iii) The remaining amount to fund the endowment shall be funded prior to release of the final group of wetland creation credits.

(b) Funds deposited in the Endowment Fund shall be held by the CDFG and expended in accordance with the description in Section VI, G. 3. of this BEI.

**E. Legal Assurances:** The Bank shall be established upon signature of this BEI.

1. Included in this BEI for the purpose of permanent conservation of the Bank lands and habitats are the following:

- (a) "Exhibit C", the draft conservation easement to CDFG as Grantee containing provisions that the property be held and managed in perpetuity as natural lands ("Conservation Easement"),
- (b) "Exhibit H", a preliminary title report and supporting documents.
- (c) "Exhibit I", a Phase-1 environmental site assessment covering the Bank Site.

2. Upon signing of the BEI by the Sponsor and CDFG, a duly executed and acknowledged Conservation Easement granted to CDFG shall be submitted and shall be recorded as soon as possible by the CDFG. Prior to recording the Conservation Easement a copy of the Title Insurance shall be submitted by the Sponsor to the MBRT for approval. CDFG shall provide all parties with copies of the recorded Conservation Easement as soon as possible after its recording. All parties shall use reasonable efforts to cooperate in the expeditious recordation of the conveyance documents.

3. Sponsor shall pay all fees and recording charges associated with the conveyance of the Conservation Easement.
4. If the land is transferred by the State of California, an MBRT-approved Conservation Easement and/or deed restriction shall be reserved and/or imposed by the CDFG in conjunction with the transfer to ensure the ongoing management of the Bank for conservation purposes in accordance with Section 815 of the California Civil Code.

**F. As-Built Drawing:** The Sponsor agrees to submit as-built drawings, with accurate maps of the constructed wetlands no later than 90 calendar days following completion of construction. The as-built drawings will describe in detail any deviation from that described in the Bank Development Plan.

## **Section V: Operation of the Bank**

**A. Service Area:** The Bank is established to provide mitigation to compensate for unavoidable impacts to Waters of the United States, including wetlands, stream bed habitat and endangered species habitat within the Service Area of the Bank, as described and shown at Exhibit B. Decisions authorizing use of credits from the Bank will be made by the appropriate authority on a case-by-case basis in accordance with applicable requirements. In general, it is agreed that use of credits from the Bank will be authorized whenever the appropriate authority determines: (i) that the particular project requiring mitigation may mitigate through bank credits; and (ii) the Bank has available for sale, mitigation credits of the type required for the particular project.

**B. Access to the Bank by the MBRT:** The Sponsor will allow, or otherwise provide for, access to the site by all signatory parties, as necessary, for the purpose of inspection and compliance monitoring consistent with the terms and conditions of this banking instrument. Inspecting parties shall provide reasonable notice to the Sponsor, during normal business hours and of not less than 24 hours in advance, prior to inspection of the Bank.

**C. Projects Eligible to Use the Bank:** Appropriate to its jurisdictional authority, each regulatory and/or resource agency will determine the eligibility of projects to use the Bank on a case-by-case basis. In general, it is agreed that activities falling within a permit under any one or more of the following authorities will typically be eligible to use the Bank, provided that the wetlands, habitats and species at the impact site are comparable to those for which the Bank has been established (wetlands and species at the Bank are intended to provide "in-kind" mitigation):

1. Section 404 of the United States Clean Water Act;
2. Sections 7 and/or 10(a) of the United States Endangered Species Act;
3. Section 1600 of the California Fish and Game Code;
4. Section 2081 of the California Endangered Species Act;
5. Mitigation identified in the County Biological Mitigation Ordinance, and/or other local agency plans, rules, regulations and/or ordinances; and
6. Mitigation under the provisions of an approved plan which is consistent with the Natural Community Conservation Program (California Fish & Game Code Section 2800 et seq.).



**D. Credit Value and Assessment Methodology:**

Credits are assigned to the Bank for both preservation and wetland replacement (creation) purposes (one credit equals one acre, sold in a minimum increment of 0.05 credit).

1. Preservation Credits are assigned on the basis of specific values associated with the Bank's pre-existing wetlands, as well as the average quality of the wetlands likely to be impacted by purchasers of credits (Exhibit B). The number of Preservation Credits is presented in Exhibit G.
2. Created/restored wetlands will be assessed as described in Exhibit B. The number of Creation Credits is presented in Exhibit G.
3. Endangered, threatened, and other special-status species credits will be measured as described in Exhibit B. The number of endangered, threatened, and other special-status species credits is presented in Exhibit G.
4. The total credit sales must comply with the San Francisco District Public Notice 02-03, dated March 5, 2003, titled "Mitigation Bank Policy on the Santa Rosa Plain".

**E. Success Criteria:** The success criteria described in Exhibit B will be used to assess project success.

**F. Schedule of Wetlands Credit Availability:** The Sponsor may sell or convey wetland creation credits identified in Exhibit G and released as follows:

1. 15% of the total credits shall be available upon approval (signing) of this BEI and the submission of an executed Conservation Easement.
2. 35% of the total credits shall be available upon the submission of as-built drawings and recordation of the Conservation Easement.
3. 20% of the total credits shall be available upon demonstrating successful hydrology (Exhibit B) and recordation of the Conservation Easement.
4. The remaining credits shall be available after three years, attainment of the "Year 3" success criteria, and a verification of the "Year 3" wetland delineation. The remaining number of wetland credits shown in Exhibit G may be revised based on the verification of the wetland delineation by USACE.

**G. Schedule of Endangered and Threatened Species Credit Availability:** Upon recording of the conservation easement, it is agreed that Endangered, Threatened, and other special-status species credits identified in Exhibit G will become available for sale or conveyance by the Sponsor in accordance with determinations to be made by the USFWS and CDFG on a case by case basis.

**H. Provisions for Uses of the Mitigation Bank Area:** Sponsor agrees and covenants that Sponsor shall comply with the Conservation Easement and shall not:

1. Use or authorize the areas proposed for dedication within the Bank for any purpose that unreasonably interferes with its use as a mitigation bank, or unreasonably interferes with or compromises the ecological functions of the bank site.
2. Erect any permanent structures within or upon the areas proposed for dedication within the Bank unless required or permitted by the approved Management Plan.
3. Construct any structures or engage in any development activities within the Bank other than those specified in the Bank Development Plan. Development activities shall mean only those actions that may change the biological, hydrological or physical characteristics of the land, but specifically do not include entry upon the land for other purposes, such as investigation, measurement, surveying, or as may be required by law or lawful order.

## **Section VI: Maintenance and Monitoring of the Bank**

**A. Maintenance Provisions:** The Sponsor agrees to perform all work necessary to maintain the Bank consistent with the Bank Development Plan and the Management Plan. Upon closure of the Bank, the Sponsor shall implement the management actions described and established in the Bank Closure Plan (Exhibit F). The Management Plan has been designed to ensure that the Bank Site is managed and maintained, in perpetuity, consistent with the conservation purposes of the Project. Deviation from the approved Management Plan is subject to review and written approval by the MBRT.

**B. Monitoring Provisions:** The Sponsor agrees to perform all work necessary to monitor the Bank in accordance with the monitoring procedures set forth in the Bank Development Plan and the Management Plan.

**C. Reports:** The Sponsor shall submit to the members of the MBRT annual reports describing the conditions of the Bank and relating those conditions to the success criteria in the Bank Development Plan. Reports shall be submitted in perpetuity as required in the Management Plan. All reports are due by July 31.

**D. Accounting Procedure:** The Sponsor shall within 30 days of credit sales submit a copy of the invoice showing to whom the credits were sold, date of the transaction and the related USACE, CDFG, and/or USFWS action identification numbers to each member of the MBRT each time credits are debited or additional credits are certified. The Sponsor shall submit an annual ledger to the MBRT showing all transactions at the Bank for the previous year and an updated ledger provided with each credit sale.

**E. Remediation Plans:** In the event the Bank fails to achieve the Success Criteria:

1. If remediation needs are identified by the Sponsor or by the MBRT in writing, the Sponsor shall develop a remediation plan and submit it within 30 days to the MBRT. The remediation plans will include proposed remedial actions and a schedule within which the actions will be implemented. Upon approval of the MBRT, the Sponsor shall then implement the necessary and appropriate remedial actions for the Bank in coordination with, and under the schedule approved by, the

MBRT. In the event the Sponsor fails to implement such remedial actions within the schedule approved by the MBRT, the USACE will implement steps in Section VIII, C, 3.

2. If the MBRT determines that the Bank is operating at a credit deficit, the Sponsor shall be notified, whereupon debiting of credits will immediately cease, and the members of the MBRT and the Sponsor, will determine what remedial actions are necessary to correct the situation. If conditions do not change or continue to deteriorate, within two years from the date that the specific remediation actions were first identified in writing to the Sponsor by the USACE, the Contingency Security funds held by CDFG may be utilized to undertake corrective measures.

**F. Transfer:** Once the Bank has been established the Sponsor shall, at any time, have the right to convey or transfer the BEI and/or Bank Property in accordance with this BEI and subject to written concurrence by the MBRT, which concurrence shall be subject to the requirement that the successor or assign has the ability to, and agrees to assume all of the Sponsor's obligations pursuant to this BEI. If such transfer is made without the prior written concurrence of the MBRT, such transfer may, at the MBRT's discretion, result in the termination of this BEI according to Section VIII, C.

Prior to transfer, the Sponsor shall provide to each member of the MBRT a signed commitment from the replacement Sponsor stating that the replacement Sponsor accepts all of the responsibilities of the BEI and/or the Bank Property. Transfer or assignment of this BEI to a party approved in writing by the MBRT shall also be subject to the requirement that any funds in a Contingency Fund or Management Endowment Fund shall continue to be expended in a manner consistent and in accordance with this BEI, the Conservation Easement, and the Management Plan, and that the Property shall continue to be protected in accordance with section 815 of the California Civil Code. If any of the required financial obligations under this BEI are not completely funded at the time of transfer, either the current Sponsor, or the replacement Sponsor, successors or assigns, shall deposit or provide security in a form approved by the MBRT for any funds necessary to completely fund these accounts prior to the transfer of the Bank.

**G. Long-Term Management, Monitoring and Reporting:** Once the short term success criteria in the Bank Development Plan have been met, the long-term maintenance and care of the Bank shall be assured by the Sponsor or its designees or successors as per Exhibit N ("Management Plan") including long-term management, monitoring, and reporting provisions.

1. The Sponsor hereby agrees to formally and legally dedicate the Bank to long term wetland conservation, and shall maintain the Bank in perpetuity in accordance with the terms and provisions of the Management Plan (Exhibit N), Bank Closure Plan (Exhibit F), and the Conservation Easement (Exhibit C).

2. CDFG shall hold the endowment principal and interest monies as required by existing law in the Special Deposit Fund, which consists of moneys that are paid into it in trust pursuant to law, and is appropriated to fulfill the purposes for which payments into it are made. CDFG shall manage these monies as required by Fish and Game Code section 13014 and Section 16370 of the Government Code, depositing monies in the Fish and Game Mitigation and Protection Endowment Principal Account of the Special Deposit Fund and using interest monies to fund long-term management, enhancement, monitoring, and enforcement activities on habitat lands in a manner consistent with the terms of this BEI, including the Management Plan (Exhibit N), or any amendments to the Management Plan

approved by BEI signatory agencies, or expended as otherwise deemed appropriate by all signatory agencies to this BEI.

3. Beginning one year after full endowment funding, Sponsor's management activities shall be funded from the Endowment Fund. Sponsor shall consult with CDFG on a year to year basis to determine the amount of funding available for management and monitoring activities. Following annual management activities, Sponsor may invoice CDFG for management activities following the invoicing instructions in Exhibit J.

**H. Bank Closure:** The Bank shall be deemed open on the date that the BEI is fully executed. The Bank shall be deemed closed upon the date that both:

1. All success criteria in the Bank Development Plan have been met; and
2. Either:
  - (a) The last authorized Bank credit has been transferred and the endowment is fully funded for one year; or
  - (b) The Sponsor sends the MBRT members written notice stating that Sponsor is closing the Bank and the endowment is fully funded for one year.

At this point, the project shall be deemed complete.

## **Section VII: Responsibilities, of the MBRT**

**A. MBRT Review:** The agencies represented on the MBRT agree to provide appropriate oversight in carrying out provisions of this banking instrument.

**B. MBRT Review:** The agencies represented on the MBRT agree to review and provide comments on all project plans, monitoring reports, remediation plans, and necessary permits for the Bank, as identified or incorporated by reference into the BEI, in a timely manner.

**C. Evaluation of Bank Progress:** The agencies represented on the MBRT agree to review and confirm reports on evaluation of success criteria prior to certifying credits in the Bank, also in a timely manner.

**D. Compliance Inspections:** The agencies represented on the MBRT shall conduct compliance inspections, as necessary, as determined in coordination with the Sponsor

1. To verify the credits then currently available in the Bank; and/or
2. Recommend corrective measures as needed.

These inspections shall continue until the effort to restore and enhance the Bank site, as described in the Bank Development Plan, has been determined to be completely successful, and as necessary thereafter, as determined by the MBRT in coordination with the Sponsor.

## **Section VIII: Other Provisions**

## **A. Force Majeure:**

1. The Sponsor shall be responsible to maintain and remediate the Bank (any portion of credits sold) except upon Catastrophic Events, events of Force Majeure or unlawful acts as defined below.

### **2. Definitions.**

a. "Catastrophic Event" shall mean an event, such as a spill of hazardous or toxic substance, the impact of a vehicle or falling aircraft, or a fire, which has a material and detrimental impact on the quality of native vegetation, soils, or wildlife of the mitigation bank and over which the Property Owner and Sponsor have no control.

b. Force Majeure shall mean war, insurrection, riot or other civil disorders, flood, earthquake, fire, governmental restriction or the failure by authority, or any injunction, which has a material and detrimental impact on the Bank; provided, however, that (i) a riot or other civil disorder shall constitute an event of Force Majeure only if the event has broad regional impacts and is not endemic to the Bank and its immediate locale; (ii) a flood shall be considered an event of Force Majeure only if it is greater than a presently projected 100-year flood, where "flood" refers to a runoff event; (iii) an earthquake shall constitute an event of Force Majeure only if the ground motion it generates at the Bank is greater than that presently projected from an earthquake with a return period of 475 years; (iv) disease shall constitute an event of Force Majeure only if such event has broad regional impact and is not endemic to the Bank and its immediate locale; and (v) governmental restriction or the failure by any governmental agency to issue any requisite permit or authority, or any injunction or other enforceable order of any court of competent jurisdiction shall not constitute an event of Force Majeure unless there is no other feasible means of remediation.

c. "Unlawful Act" shall mean the unlawful act of another and shall include an event or series of events, such as the intentional dumping within the Bank or tributaries of the creek of a hazardous toxic substance, or the discharge of such a substance by any person or entity other than Property Owner or the Sponsor in violation of a statute, ordinance, regulation or permit, which event or series of events has a material and detrimental impact on the water quality, native vegetation, soils or wildlife of the Bank.

3. Notwithstanding the foregoing, subject to availability of funds as specified in Section VI, G, Sponsor shall not be relieved from the obligation to maintain and remediate the Bank by reason of any such discharge which occurs as a result of normal noncatastrophic activities. In case of occurrence of a Catastrophic Event, events of Force Majeure, or unlawful acts, Sponsor, and the MBRT shall meet to discuss the future course of action and management of the Bank (areas where credits have been withdrawn) and shall continue their obligation to the extent practicable using the remaining funds in the account.

### **4. The Sponsor shall bear the burden of demonstrating:**

(a) That the noncompliance was caused by circumstances beyond the control of the Sponsor and/or any entity controlled by the Sponsor, including its contractors and consultants;

- (b) That neither the Sponsor nor any entity controlled by the Sponsor, including its contractors and consultants, could have reasonably foreseen and prevented such noncompliance; and
- (c) The period of noncompliance was caused by such circumstances.

5. Reasonably foreseeable technical problems, or unanticipated or increased costs or expenses associated with the implementation of actions called for by this BEI, or changed financial or business circumstances in and of themselves shall not serve as the basis for modifications of this BEI or extensions for the performance of the requirements of this BEI.

6. Compliance with any requirement of this BEI by itself shall not constitute compliance with any other requirement. An extension of one compliance date based on a particular incident shall not necessarily result in the extension of a subsequent compliance date or dates. The Sponsor must make an individual showing of proof regarding the cause of each delayed step or requirement for which an extension is sought.

## **B. Dispute Resolution:**

1. Between Members of the MBRT: Resolution of disputes about application of this banking instrument as between the members of the MBRT shall be in accordance with those stated in the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 FR 58605 et seq.).

2. Between the MBRT and Sponsor: In the event of any disagreement or dispute between one or more members of the MBRT, and the Sponsor regarding the interpretation and application of the provisions of this BEI, the appropriate MBRT member and the Sponsor shall meet within 30 days of a written request therefore made by a party, and shall attempt to resolve such disagreement or dispute. In the event that the MBRT member and Sponsor have not resolved the disagreement or dispute within 60 days of the date of the notice first requesting a meeting, then either party may elect to resolve the dispute or disagreement by the appropriate remedies then available under federal law.

## **C. Execution, Modification and Termination of the Banking Instrument:**

### **1. Execution**

The Conservation Easement shall be recorded as per Section IV, E, and a copy of the recorded easement shall be submitted to the MBRT for inclusion in the BEI as a revised Exhibit C. The Sponsor must sign the BEI, prior to the signature and execution of the BEI by the members of the MBRT. Subsequently, the BEI may be executed in part by each agency that chooses to become signatory to said document. The BEI will become valid and enforceable as between each signatory agency and the Sponsor on the date of that agency's signature.

### **2. Modification**

This BEI may be amended or modified with the written approval of each of the MBRT members and the Sponsor.

### **3. Termination**

Terms and provisions of this BEI will be valid until:

(a) Termination of BEI Prior to Credit Sales. The Sponsor may withdraw the entire Bank Site and terminate this BEI at any time provided that:

- (i) No mitigation credits developed in the Bank have been sold or conveyed in order to compensate for the loss of wetland or special status species habitats; and
- (ii) The wetland acreage and habitat values of any wetland habitat existing on the Bank site prior to the initiation of efforts to restore and enhance the site shall be preserved in a condition at least equal to that prior to initiation of Bank establishment efforts.

(b) Termination of BEI After Credit Sales Begin. As regards individual signatories to the BEI, termination of the BEI may only happen consistent with the following terms:

- (i) Any of the MBRT members, with the exception of the USACE, CDFG, and USFWS, may terminate their participation upon 30 calendar days' written notification to all signatory parties.
- (ii) USACE may only terminate their participation on the MBRT upon failure of the Sponsor to perform per the terms of the BEI. Such termination shall occur only after written notice of deficiency and opportunity to correct by the Sponsor, under the terms of the BEI, have failed to produce necessary corrective action on the part of the Sponsor. Subject to the above, USACE may terminate their participation upon 60 calendar days' written notification to all signatory parties.
- (iii) The CDFG and USFWS may terminate their participation in this BEI on the condition that each of the following has occurred:

(a) Sponsor has breached one or more Owner Covenants or terms and conditions set forth herein;

(b) Sponsor has received written notice of such breach and order to cease Credit sales from the CDFG and USFWS; and

(c) Sponsor has failed to cure such breach within thirty (30) days after such notice; provided that in the event such breach is curable in the judgment of the CDFG and USFWS, but cannot reasonably be cured within such thirty (30) day period, the CDFG and USFWS shall not terminate this BEI so long as Sponsor has commenced the cure of such breach and is diligently pursuing such cure to completion. Nothing in this paragraph is intended or shall be construed to limit the legal or equitable remedies (including specific performance and injunctive relief) at law available to the CDFG and USFWS in the event of a threatened or actual breach of this BEI.

(d) Sponsor is in default under this BEI as described above, and fails to cure such breach, and Sponsor fails to designate a replacement Sponsor in accordance with Section VI, F above within 180 days of Sponsor's receipt of written notice from any member of the MBRT that the Sponsor is in default of its obligations under the BEI. If Sponsor fails to designate a replacement Sponsor, then such public or private land or resource management organization acceptable to and as directed by the MBRT may enter onto the Bank property in order to fulfill the purposes of the Bank as described in the BEI.

(e) Sponsor provides the remainder of any Endowment Fund deposits necessary to fully fund the Endowment to carry out the long-term management of the Bank property.

(iv) Upon written concurrence of the MBRT, this BEI may be terminated following the sale or conveyance of all available Credits and satisfaction of all substantive terms and conditions of this BEI other than ongoing management obligations such as maintenance and monitoring, as set forth in the Management Plan, provided that the Endowment Fund shall continue to be expended in a manner consistent and in accordance with the conservation purposes for which it was established pursuant to this BEI and California Civil Code Section 815, any Conservation Easement, and the

Management Plan, and any Conservation Easement shall continue in perpetuity as a covenant running with the land.

(v) If requested, the member(s) of the MBRT proposing to terminate participation in the MBRT agree to meet with the other MBRT members to discuss the reason(s) for such termination, prior to the termination taking effect. Notice of a request for such meeting shall be made by the requesting MBRT member(s) not later than 15 calendar days from receipt of the notice of termination.

(b) Termination by one member of the MBRT of its involvement in this BEI shall not terminate or affect the relationship between the remaining members of the MBRT, toward each other or the Sponsor, under this BEI.

(c) As regards the termination of the BEI in its entirety, the terms and provisions of this BEI will be valid:

(i) For two years from the last date of execution of the BEI by the MBRT members in the event that no credits are sold from the bank; or

(ii) Until the Bank Closure Plan has been implemented to the satisfaction of the MBRT and the USACE provides notice, in writing, to the Sponsor that this instrument may be terminated.

**D. Specific Language of Bank Enabling Instrument Shall be Controlling:** To the extent that specific language in this document changes, modifies or deletes terms and conditions contained in those documents that are incorporated into the BEI by reference, the specific language within the BEI shall be controlling.

**E. Entire BEI:** This BEI, and all exhibits, addenda, schedules and agreements referred to in this BEI, in addition to any other elements of a BEI required under the Federal Guidelines not heretofore provided by the Sponsor, constitute the final, complete and exclusive statement of the terms of the agreement between and among the MBRT and the Sponsor pertaining to the Bank and supersedes all prior and contemporaneous understandings or agreements of the parties. Each party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other party or anyone acting on behalf of any party unless the same has been embodied herein.

**F. Reasonableness, And Good Faith:** Except as specifically limited elsewhere in this BEI, whenever this BEI requires Sponsor or the MBRT to give its consent or approval to any action on the part of the other, such consent or approval shall not be unreasonably withheld or delayed. If either the Sponsor, or the MBRT disagrees with any determination covered by this provision and reasonably requests the reasons for that determination, the determining party shall furnish its reason in writing and in reasonable detail within 15 business days following the request.

**G. Partial Invalidity:** If a court of competent jurisdiction holds any clause of this BEI to be invalid or unenforceable, in whole or in part, for any reason, the validity and enforceability of the remaining clauses, or portions of them, shall not be affected unless an essential purpose of this BEI would be defeated by loss of the invalid or unenforceable provision.

**H. Notices:** All notices (including requests, demands, approvals or other communications) under this BEI shall be in writing. Notices by the Sponsor to the MBRT shall be made to all of the



members of the MBRT. Such notice shall not be effective until deemed received by all members of the MBRT.

Addresses for purposes of giving notice are set forth below. Either party may change its address, telephone number, or fax number by giving the other party notice of the change in any manner permitted by this section.

**MBRT:**

- (1) U.S. Army Corps of Engineers  
San Francisco District  
Attn: Chief, Regulatory Branch, Rm. 813  
333 Market Street  
San Francisco, CA 94105

Telephone: (415) 977-8439 Fax: (415) 977-8343

- (2) California Department of Fish and Game, Region 3  
Attn: Regional Manager  
P.O. Box 47  
Yountville, CA 94599

Telephone: 707-944-5500 Fax: (707) 944-5563

California Department of Fish and Game  
Habitat Conservation Planning Branch, Banking Coordinator  
1416 Ninth Street, 12<sup>th</sup> Floor  
Sacramento, CA 95814

Telephone: 916-651-7785 Fax: (916) 653-2588

- (3) U.S. Fish and Wildlife Service  
Sacramento Fish and Wildlife Office  
Attn: Field Supervisor  
2800 Cottage Way, W-2605  
Sacramento, CA 95825

Telephone: (916) 414-6600 Fax: (916) 414-6713

- (4) U.S. Environmental Protection Agency, Region 9  
Attn: Director, Water Division  
75 Hawthorne Street  
San Francisco, CA 94105

Telephone: (415) 972-3572 Fax: (415) 947-3537

**Sponsor:(Name and Address)**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

**L. Restriction on Benefit:** No member of or delegate to the United States Congress or Federal Resident Commissioner shall be entitled to any share or part of this BEI, or to any benefit that may arise from it.

**M. Counterparts:** This BEI may be executed in any number of duplicate and counterpart originals. A complete original of this BEI containing original signatures of each of the parties shall be circulated to each of the parties by Sponsor and a complete original of this BEI shall be maintained in the official records of each of the parties hereto.

**N. No Third Party Beneficiaries:** This BEI shall not create any third party beneficiary hereto, nor shall it authorize anyone not a party hereto to maintain a suit for personal injuries, property damages or enforcement pursuant to the provisions of this BEI. The duties, obligations and responsibilities of the parties to this BEI with respect to third parties shall remain as otherwise provided by law in the event this BEI had never been executed.

## Section IX: Execution

This BEI shall become effective on the date of the signature by the last agency to sign this BEI, and shall be binding only upon Sponsor and the agencies so signing.

\_\_\_\_\_  
Sponsor - \_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
District Engineer  
San Francisco District  
U.S. Army Corps of Engineers  
Chair, MBRT

\_\_\_\_\_  
Date

\_\_\_\_\_  
Manager, California/Nevada Office  
U.S. Fish and Wildlife Service  
Member, MBRT

\_\_\_\_\_  
Date

\_\_\_\_\_  
Regional Manager  
California Department of Fish and Game,  
Central Coast Region  
Member, MBRT

\_\_\_\_\_  
Date

\_\_\_\_\_  
Director, Water Division  
U.S. Environmental Protection Agency, Region 9  
Member, MBRT

\_\_\_\_\_  
Date